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Regulation of Time Sharing in South Carolina

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NOTE

REGULATION OF TIME SHARING IN SOUTH CAROLINA

I. INTRODUCTION

Despite the bad reputation that time sharing[1] has acquired in its twelve years of existence,[2] through reports of scams and questionable sales tactics, the industry's sales in 1984 were about $1.7 billion, nearly three times the 1979 level.[3] Part of the reason for this growth in sales has been the huge market for time sharing among middle class families. Holiday Inn founder Kemmons Wilson, who recently completed a model time sharing resort near Orlando, Florida, said of time sharing, "It's the only way I know that the average person can have a second home."[4]

Time sharing is an appealing investment for many vacationers who are unwilling to pay the inflated rates charged by resort area hotels and unable to afford the price of vacation homes of their own. While purchasers can expect to pay between 50,000 and 300,000 dollars for ownership in a resort condominium that they may only use once a year, they can purchase a time segment of occupancy in a similar unit for only 2,000 to 6,000 dol-

1. South Carolina's Statute uses the expression "vacation time sharing." *See* S.C. CODE ANN. § 27-32-10 to -240 (Supp. 1985). The term "time sharing" is derived from the computer industry. When computers were still very expensive, service companies maintained pools of computers and rented processing time or timesharing to users. Gray, *Pioneering the Concept of Time-Sharing Ownership*, 48 ST. JOHN'S L. REV. 1196, 1197 (1974).

2. In 1983, one commentator stated: "The time-sharing concept of property ownership is now ten years old." August, *Clockwork Condo: The Time sharing Condominium Stumbles into Court*, 11 REAL ESTATE L.J. 203, 203 (1983).

3. Paris, *The Auctioneer's Song*, FORBES, March 25, 1985, at 102, 102.

4. Rock, *Time Shares: Paradise or Palm Treed Squalor*, MONEY, June 1985, at 120, 126. *See also* August, *supra* note 2, at 204. ("Of the 65 million American families, 31.5 million can afford this form of recreational housing, while only 1.3 million can afford to purchase a second home outright").

lars per week, plus a yearly maintenance fee.[5] In addition, because exchange networks are usually offered to time-sharing owners, the consumer can avoid repetitive vacations to the same resort, which necessarily result from condominium ownership.[6] Developers, on the other hand, have been attracted by the enormous market for time shares and the attendant potential for profit. When condominium developers experienced financial troubles during the recession of the mid-1970s, they perceived time sharing as a possible solution.[7]

The recent growth[8] in the time-sharing industry has not come about without its problems. The concept has been subjected to considerable criticism by commentators.[9] The well-publicized reports of fraud, misrepresentation, and other malfeasance perpetrated by some time-sharing developers[10] have made

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5. Dickerson, *Consumer Statutes and Class Actions Make It Feasible*, NAT'L L.J., June 7, 1982, at 44, 44, col. 1.

6. Gunnar, *Regulation of Resort Time-Sharing*, 57 OR. L. REV. 31, 32 (1977). One commentator has provided the following description of the exchange networks:

> [T]here are exchange companies that are in the business of facilitating exchanges or trades on any time-share owners in various locales. For example, the use of 1/52 of a condo in Hawaii in perpetuity may get boring after two or three visits. In this event the time-share owner may wish to vacation elsewhere without losing the perceived benefit of his investment. This can be accomplished by exchanging the use of a Hawaii time-share for someone else's Lake Tahoe time-share and so forth. The exchange companies list time-shares available for trading and charge a fee for performing this service.

Dickerson, *supra* note 5, at 44, col. 2-3.

7. Comment, *Recent Developments in Florida Timesharing: Good News and Bad for the Timeshare Consumer*, 13 STETSON L. REV. 591, 593 (1984).

8. The number of time-share offerings totaled 8 in 1973, 95 in 1976, and 120-50 in 1977. *See* Gunnar, *supra* note 6, at 32 n.4. Today there are 70 time share offerings in South Carolina. Interview with Kenneth Hagreen, then General Counsel for the South Carolina Real Estate Commission, in Columbia, South Carolina (November 5, 1985)[hereinafter cited as Hagreen Interview].

9. *See, e.g.* Laguna Royale Owners Ass'n v. Dargan, 119 Cal. App. 3d 670, 689, 174 Cal. Rptr. 136, 148 (1981)(Gardner, J. dissenting)("Timesharing is a remarkable gimmick. P.T. Barnum would have loved it. It ordinarily brings enormous profits to the seller and in this case would bring chaos to other residents."); Rock, *supra* note 4, at 120 ("What you should look out for, in addition to suede-shoe sales tactics, is shaky financial foundations."); Dickerson, *supra* note 5, at 44 Col. 1 (time sharing is "a new vacation concept often promoted by high pressure salesmen using many of the flim-flam techniques").

10. For a classic example of the magnitude of abuses in the industry, see United States v. Weiwasser, No. CR85-139V (W.D. Wash. May 3, 1985). In that case the developer intentionally misrepresented and concealed facts about the accommodations, facilities, and benefits available to purchasers. A preliminary injunction was entered as the result of a complaint by the FTC that the defendant had violated the Federal Trade

the general public wary of the time-sharing concept.[11] For example, in a March 1983 survey of time-share purchasers, thirty-five percent said negative publicity had caused them to hesitate before purchasing.[12] In addition, many prospective purchasers are dissuaded by the complexity and novelty of the property relationship with the developer and with other time-share owners. All this negative publicity has had its impact on the industry.

The time-sharing industry continues to expand, however, despite the potential for consumer dissatisfaction and for fraud by unscrupulous developers. A major reason for this growth, even in the face of substantial criticism, can be found in the attempts by many states to address the industry's problems through legislation. In 1975 Utah amended its Condominium Ownership Act to include time-sharing interests within its act's statutory definitions.[13] In 1978 South Carolina joined the vanguard of states enacting statutes to regulate time sharing.[14] In 1979, the Conference of Commissioners on Uniform State Laws adopted the Uniform Real Estate Time Share Act (URETSA),[15] and in 1980 representatives of the time-sharing industry itself entered the regulation field by drafting the Model Time-Share Ownership Act, which Nebraska adopted in the same year.[16] Currently, there are twenty-one states that regulate time sharing either independently or in connection with a condominium statute.[17]

Commission Act, 15 U.S.C. § 45 (1982). FTC v. Paradise Palms Vacation Club, No. C811160V (W.D. Wash. Oct. 30, 1981)(preliminary injunction entered). The defendant, however, continued to sell time shares in direct violation of the injunction. The developer sold weeks to more than 2,500 people by showing them sales brochures depicting condominiums in Hawaii. As it turned out, the development had fewer than 20 Hawaian units. When people complained, they were told they could get a motel room in Ocean Shores or an apartment on Lake Tahoe.

11. Comment, *supra* note 7, at 594-95.

12. *Id.* at 595 (citing Richard Ragatz Assoc., Inc., *Purchasers of Timeshare Intervals in Florida: Who Are They, Why They Buy* 35 (1983)).

13. UTAH CODE ANN. § 57-8-3(7) (Supp. 1982).

14. Vacation Time Sharing Plans Act, No. 640, 1978 S.C. Acts 1897 (codified as amended at S.C. CODE ANN. §§ 27-32-10 to -240 (Supp. 1985)).

15. *Reprinted in* M. HENZE, THE LAW AND BUSINESS OF TIME-SHARE RESORTS app. 6 (1982). The Resort Time-sharing Council of the American Land Development Association and the National Association of Real Estate Licensing Law Officials have adopted this act. The Nebraska version is found at NEB. REV. STAT. §§ 76-1701 to -1741 (1981).

16. *Reprinted in* M. HENZE, *supra* note 15, app. 5.

17. The following state statutes regulate time sharing: ARIZ. REV. STAT. ANN. §§ 32-2197 to -2197.17 (Supp. 1985); ARK. STAT. ANN. §§ 50-1301 to -1338 (Supp. 1985); CAL.

As long as the time-sharing industry continues to grow, both consumers and developers will continue to encounter problems. The South Carolina legislature made a start at addressing these problems by enacting the Vacation Time Sharing Act (the Act) in 1978.[18] This young industry, however, continues to generate new problems that will require new legislative solutions. This is particularly true in a coastal state like South Carolina, which is the site of much resort property and a rapidly growing time-sharing industry.[19]

II. THE TIME-SHARING CONCEPT

The origins of the time-sharing concept can be traced to the condominium and the concept that an individual could own "a subdivision of the airspace within a building located on the surface of real estate."[20] This concept led, inevitably, to the recognition that an individual could also own, jointly with other "time sharers," a specified period of time in a condominium unit. This joint ownership of time period units is time sharing.

A. Fee Ownership

Time sharing can be divided into two major categories: fee ownership and nonfee ownership. Under the fee ownership scheme, a purchaser receives an infinite possessory ownership interest, which can be sold, devised, conveyed, encumbered, and

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ADMIN. CODE §§ 2810-2813.13 (1981); COLO. REV. STAT. §§ 38-33-101 to -111 (1973 & Supp. 1984); CONN. GEN. STAT. ANN. §§ 42-103(W) to -103(bb) (Supp. 1985); FLA. STAT. ANN.§§ 721.01-.30 (West 1981 & Supp. 1982); GA. CODE § 44-3-160 (Supp. 1985); HAWAII REV. STAT. § 514E (Supp. 1983); LA. REV. STAT. § 9:1131.1-.30 (West Supp. 1986); ME. REV. STAT. ANN. § 33-593 (Supp. 1985); NEB. REV. STAT. § 76-1701 (1981); NEV. REV. STAT. §§ 119A.010-.710; N.H. REV. STAT. ANN. § 356-B:3 (1984); N.C. GEN. STAT. § 43A-39 (1985); OR. REV. STAT. §§ 94.803-.945 (1985); S.C. CODE ANN. § 27-32-10 to -240 (Supp. 1985); S.D. CODIFIED LAWS ANN. §§ 43-15B-1 to -7 (1983); TENN. CODE ANN. § 66-32-101 (1982 & Supp. 1985); UTAH CODE ANN. § 57-8-3(7) (1953 & Supp. 1979); VA. CODE § 55-360 (1981 & Supp. 1985); W. VA. CODE §§ 36-9-1 to -26 (Michie 1985).

18. No. 640, 1978 S.C. Acts 1847 (codified as amended at S.C. CODE ANN. §§ 27-32-10 to -240 (Supp. 1985)).

19. In 1984 Marriott Corp. took over four projects on Hilton Head Island and now has plans to build or buy others. Rock, *supra* note 4, at 121.

20. Straw, *Representing a Purchaser of a Time Share*, 11 COLO. LAW. 1543, 1544 (1982).

mortgaged.[21] Fee time sharing, or time-share ownership, (TSO), is based on the common-law concepts of the estate for years, tenancy in common, and interval estate.[22] The purchaser is given "an undivided interest in the fee, coupled with an exclusive right of occupancy during designated time periods."[23] Under a variation of the TSO, known as "interval ownership," purchasers receive the exclusive right to use the unit during fixed periods, coupled with a remainder in a tenancy in common to all the purchasers. During the estate for years, title to a time-share unit circulates among interval owners according to a recurring fixed schedule, vesting in each owner for a period of time until a date certain when title vests in all the owners as tenants in common.[24]

B. Nonfee Ownership

There are two forms of nonfee ownership. The first is the nonownership variety, which includes both the "right-to-use," or "vacation" lease, and the vacation license. The second is the part ownership variety, which is an agreement to purchase stock or a membership rather than an interest derived from real property.

Under the right-to-use or vacation lease, the developer retains title, while the purchaser obtains, in effect, a prepaid lease of a designated unit for a fixed period each year. When the lease expires, the right to occupy reverts to the developer or owner of the fee simple. This type of lease provides advantages for developers and purchsers. Because they retain a fee interest, developers can use the equity to secure loans and profit from any appreciation in the units' value. Purchasers, on the other hand, enjoy the advantage of avoiding responsibility for taxes, management, mortgage payments, insurance, closing costs, or any other attributes of home ownership.[25] Purchasers, however, are subject to several disadvantages as well: They have no control over man-

21. M. HENZE, *supra* note 15, § 3.03-.04.

22. Straw, *supra* note 20, at 1544. In Straw's discussion of the forms, he equates the estate for years with the interval estate. Other authors have treated them as separate concepts. *See, e.g.*, M. HENZE, *supra* note 15, § 3.03[4].

23. Gunnar, *supra* note 6, at 33.

24. M. HENZE, *supra* note 15, § 3.03-.04.

25. *Id.* § 3.02[3][a].

agement, are subject to any contractual conditions in the lease, and run the risk that the fee owners may encumber the property until it is eventually foreclosed.[26]

A vacation license is little different from a vacation lease. A license is merely a prepaid option or permission to use the developer's property for a fixed period of time. The interest in a vacation license is merely contractual, and the licensee acquires no interest in the real property itself.[27]

Under the part-ownership form of nonfee time sharing, the developer forms a corporation, club, nonprofit corporation, or limited partnership consisting of persons interested in owning time shares. If the corporate form is used, owners purchase shares entitling them to the right to occupy a unit. With the club form, the club holds the units for the use of the members. Members acquire a right to use a unit owned by the club through payment of membership and maintenance fees. When a limited partnership is used, a corporation is formed to be the general partner and manager, while the time-share owners are the limited partners. This nonownership form is far less common than a vacation license, vacation lease, or fee ownership.[28]

Myriad forms of ownership interests are available. Few prospective purchasers are aware of the various options or understand what interest they are actually purchasing. Although state regulation of time sharing can resolve some of the problems, the complexity of the time-sharing concept suggests that purchasers would be wise to retain an attorney so that they will know what they are buying and be able to avoid unnecessary disappointments.

III. REGULATION PRIOR TO SOUTH CAROLINA'S TIME-SHARE ACT

Prior to passage of the Vacation Time Sharing Plans Act[29] time-share purchasers in South Carolina had little substantive protection. They assumed a huge risk and had only common-law rights on which to rely.

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26. *Id.* § 3.02[3].
27. *Id.* § 3.02[4].
28. M. HENZE, *supra* note 15, § 3.02[5]-[7].
29. S.C. CODE ANN. §§ 27-32-10 to -240 (Supp. 1985).

A. *State Regulation Prior to the Act*

At the state level, time sharing could probably have been regulated, if at all, only under the Horizontal Property Act, which governs condominium sales.[30] This statute's major drawback for time-share purchasers is its failure to provide any extensive disclosure requirements,[31] a crucial safeguard for time-share purchasers. In addition, the statute imposes no restrictions on developers' advertising campaigns and provides no assurance that management associations would be properly structured. Some time-sharing offers would not even have come within the scope of the condominium statute because they are not recognized as interests in land. In general, a condominium statute is simply not equipped to protect consumers or to regulate time-sharing developers.[32]

B. Federal Regulation

The federal government is, in some respects, better equipped than states to regulate time sharing. While a state can reach only in-state time-share offers, federal statutes, such as the Interstate Land Sales Full Disclosure Act (ILSFDA),[33] can protect consumers from deceptive and fraudulent sales practices in interstate commerce. Most time-sharing offers, however, cannot be reached under the ILSFDA because that statute exempts from its coverage the sale of lots on which there is a completed building or for which the developer is under a contractual obligation to complete a building within two years of the date of the sale.[34] As a result, the primary regulatory device available to the federal government is the Federal Trade Commission Act.[35] With an increasing number of states now regulating time sharing, the need for the federal regulation has diminished. Even

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30. *Id.* §§ 27-31-10 to -440 (1976).

31. On the importance of full disclosure in time-share transactions, see *infra* notes 40-41 and accompanying text.

32. For a discussion of regulating time sharing under condominium statutes, see Gerando, *Timesharing*, 29 UCLA L. REV. 907, 934-35 (1982).

33. 15 U.S.C. §§ 1701-02 (1982).

34. *Id.* § 1702(a)(2).

35. *Id.* § 45. In 1982 the Federal Trade Commission Act was used in a case of substantial abuse in the time-sharing industry. *See* FTC v. Paradise Palms Vacation Club, No. C811160V (W.D. Wash. Sept. 30, 1981); *supra* note 10.

some municipalities are now regulating time sharing through local ordinances.[36]

IV. SOUTH CAROLINA'S RESPONSE: THE VACATION TIME SHARING PLANS ACT

A. Consumer Protection Orientation

Recognizing the need for legislation to provide consumer protection and effective regulation of time-share developers, South Carolina enacted its own time-sharing act in 1978. South Carolina was one of the first states in the nation to enact a comprehensive time-sharing act, and since its enactment, the Vacation Time Sharing Plans Act[37] has brought respectability to the industry and culled unscrupulous developers.

The primary purpose of the Act is to protect the consumer through strict enforcement of broad registration requirements for developers.[38] To achieve this purpose, the Act requires, *inter alia*, full, fair, and accurate disclosure to the South Carolina Real Estate Commission. First, the developer must make proof of ownership and of a proper organizational structure, including a mortgage deed, time-share declaration, and a management company. Second, the developer must provide insurance and follow the procedures for transfer of clear title. Third, the developer must maintain an escrow account to insure proper payment of the underlying mortgage and to make refunds to the purchaser who decides to cancel. Finally, the developer must provide certain disclosures in the contract that the consumer receives.[39] These disclosure requirements are intended to protect consumers from unscrupulous marketing and sales practices and to insure that consumers receive what they have been promised.

To protect consumers, the Act requires that the contract contain the following disclosures: (1) the actual date of the contract; (2) the name and address of the seller; (3) a statement, in close proximity to the signature, that the buyer may cancel

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36. *See, e.g.*, LAS VEGAS, NEV., MUN. CODE ch. 47, tit. V (1921); VAIL, COLO., ORDINANCES 25, 26, 27, 28, 29, 36 (1980), *reprinted in* M. HENZE, *supra* note 15, app. 8.

37. S.C. CODE ANN. §§ 27-32-10 to -240 (Supp. 1985).

38. Hagreen Interview, *supra* note 8.

39. S.C. CODE ANN. §§ 27-32-20, -90, -100 (Supp. 1985).

within four days;[40] (4) the total financial obligation of the purchaser; (5) the names of any businesses that could affect the purchaser's rights and the contract's conditions; (6) the nature and duration of the agreement; (7) a bold-faced typed statement, in "immediate proximity" to the signature, that the purchaser should not rely on any representations not included in the contract; (8) the date of the availability of amenities; and (9) the specific term of the contract.[41] The primary protection afforded consumers by the Act is the four-day right to cancel and obtain a full refund.[42]

The responsibility for enforcing and implementing the intent of the Act is entrusted to the South Carolina Real Estate Commission.[43] The Commission attempts to accomplish this purpose through registering new time-share plans, auditing various escrow accounts, and licensing developers. The attorney general is authorized, at the request of the Real Estate Commissioner, to prosecute any alleged violations.[44]

B. Forms of Time Sharing Covered by the Act

The scope of the Vacation Time Sharing Plans Act is broad enough to cover any of the time-sharing forms previously discussed.[45] The Act defines a "vacation time sharing ownership plan" as

> any arrangement, plan or similar devise, whether by tenancy in common, sale, deed or by other means . . . whereby the purchaser receives an undivided ownership interest . . . for a specific period of time during any given year, but not necessarily for consecutive years, which extends for a period of more than one year.[46]

A "vacation time sharing lease plan" is defined as

> any arrangement, plan, or similar devise, whether by membership agreement, lease, rental agreement, license, use agree-

40. *Id.* § 27-32-40(1)-(3).
41. *Id.* § 27-32-100(1)-(6).
42. *Id.* § 27-32-40. *See infra* notes 69-84 and accompanying text.
43. *Id.* § 27-32-130.
44. *Id.* § 27-32-130.
45. *See supra* notes 21-26 and accompanying text.
46. S.C. CODE ANN. § 27-32-10(8) (Supp. 1985).

> ment, security or other means, whereby the purchaser receives a right to use accommodations or facilities or both, but does not receive an undivided fee simple interest in the property, for a specific period of time during any given year, but not necessarily for consecutive years, and which extends for a period of more than one year.[47]

A "vacation time sharing plan," as used in the Act, refers to either of the above.[48] Although the Act applies to all the fee and nonfee ownership forms, it does not cover time-share exchange networks:

> Such lease plans do not include an arrangement or agreement whereby a purchaser in exchange for an advance fee and yearly dues is entitled to select from a designated list facilities located in more than one state accommodations, of companies which operate nationwide in at least nine states in the United States through franchises or ownership, for a specified time period and at reduced rates and under which no interest in real property is transferred.[49]

The Act's definitions also exclude from its coverage a family-type time share when several tenancies in common are created in a single family unit. The Act provides that "the provisions of this chapter shall not be applicable to . . . the sale of real estate by anyone who is the owner thereof or who owns any interest therein."[50]

The definitions of the various forms of time sharing in the Vacation Time Sharing Plans Act follow closely Florida's Real Estate Time-Sharing Act,[51] which "has been widely acclaimed as the most comprehensive and innovative act passed to date."[52] Like the Florida statute, but unlike the Model Act,[53] the South Carolina Act distinguishes between fee and nonfee forms of time sharing. These distinctions are important because the two forms are so different and, consequently, the rights of the parties should also be different.

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47. *Id.* § 27-32-10(9).
48. *Id.* § 27-32-10(10).
49. *Id.* § 27-32-10(9).
50. *Id.* § 27-32-10(7).
51. FLA. STAT. ANN. § 721 (Harrison 1983).
52. M. HENZE, *supra* note 15, § 9.03[2], at 9-8.
53. *See supra* note 15.

One of the Act's flaws is that it never explicitly recognizes time sharing as ownership of real property. The condominium statutes specifically recognize ownership of condominiums as real property interests in order to avoid legal problems of title and to make the concept acceptable to lenders, title insurance companies, purchasers, and developers.[54] If the time-sharing act had recognized time sharing as a property interest, time-share purchasers could enjoy similar benefits.

Another defect in the Act's definitions is the failure to address the creation of time shares by the owners of condominiums and homes in previously established projects. The California Court of Appeals confronted such a conversion in *Laguna Royale Owners Association v. Darger*.[55]

In that case the owners of an ocean front condominium sought to sell shares in their apartment to two or three other couples.[56] The court held invalid an agreement prohibiting condominium occupants from transferring or assigning their interests in the unit without the consent of the owners' association.[57] The condominium "owners" were, therefore, free to sell time-share interests in their unit.

If this situation had arisen in South Carolina, the owners would have been exempt from the provisions of the time-sharing Act because they were *owners*.[58] They could establish time shares in a previously existing project against the will of the other owners and without complying with the terms of the time-sharing act.

The drafters of URETSA foresaw this problem, but failed to address it adequately. This act provides that "time shares may not be created in any unit in a project unless expressly permitted by the project unit."[59] A single individual, such as the owner in *Laguna Royale*, however, could satisfy this requirement if "[80] percent of the units . . . consent."[60] Thus, the South Carolina Act fails to protect associations of current own-

54. *See* Johnakin, *Legislation for Time Share Ownership Projects*, 10 REAL PROP., PROB. & TRUST J. 607, 608 (1975).

55. 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981).

56. *Id.* at 673-79, 174 Cal. Rptr. at 138-41.

57. *Id.* at 688, 174 Cal. Rptr. at 147.

58. *See* S.C. CODE ANN. § 27-32-10(7) (Supp. 1985).

59. UNIF. REAL ESTATE TIME-SHARE ACT § 2-101 (1980). *See supra* note 15.

60. *Id.* § 2-101.

ers at all, and URETSA provides only limited protection.

C. Registration Requirements

Most of the Vacation Time Sharing Plans Act is devoted to the elaborate requirements that must be met before a vacation time-sharing plan can be registered in South Carolina. In order to register a time-sharing plan, the seller must provide the Real Estate Commission with the following items: (1) a copy of the contract establishing the rights and responsibilities of the parties; (2) copies of any promotional brochures or advertisements; (3) a statement of the type of business entity selling the plans, along with a list of the names and addresses of all personnel; (4) copies of all contracts between the entity and the business providing the accommodations; (5) copies of all rules on the use of the accommodations; (6) a statement of all existing liens; (7) a synopsis of any sales presentation; and (8) a projected budget of all recurring expenses.[61] The seller also must retain a copy of all those documents in its business records[62] and must pay the South Carolina Real Estate Commission a registration fee of 100 dollars.[63] Entities registering out-of-state time shares must also comply with the registration requirement and must pay a 250-dollar fee.[64] Any business entity that solicits in this state, by phone, mail, or otherwise, is required to register with the Commission as well. As of November 1985, approximately twenty out-of-state time shares were registered in South Carolina.[65]

Before a plan can be registered, the seller must satisfy certain conditions set out in the statute. After receipt of an application, the Commission conducts an investigation to determine that the plan can be conveyed and that the advertising is not false or misleading. The Commission also investigates the seller's background, since no plan can be registered if the seller has been convicted of a crime involving land sales, moral turpitude, securities violations, or fraudulent business activities within the preceding ten years or has been subject to an injunction pertain-

61. S.C. CODE ANN. § 27-32-20 (Supp. 1985).
62. *Id.* § 27-32-30.
63. *Id.* § 27-32-150(A).
64. *Id.* § 27-32-150(B).
65. Hagreen Interview, *supra* note 8.

ing to those activities.[66] The burden, therefore, is on the Commissioner to see that the necessary disclosures have been made. Once these onerous requirements have been met, the Commissioner enters an order registering the plan.

Despite these extensive registration requirements, the Act does not require the seller to provide the purchaser with copies of any documents other than the sales contract.[67] The Florida time share act provides that even after a project is approved, it cannot be sold unless a copy of all the required documents is given to the purchaser.[68] Perhaps it is best to leave to the Commissioner the job of wading through the plethora of required documents. In the unlikely event that a consumer would be interested in reading these documents, she or he can procure copies from the Commission.

D. The Buyer's Right to Cancel

A major complaint against the time-share industry has been the use of aggressive sales tactics, and the South Carolina Act has attempted to address this problem. Under the Act, consumers who feel they were pressured into buying a time share may cancel their contract at any time within four days.[69] In addition, the right of cancellation must be set forth "in close proximity to the signature."[70] In the case of a lease plan, the contract may be cancelled *at any time* if the accommodations are no longer available. Under an ownership plan, on the other hand, the right to cancel is lost if three days elapse between the signing of the contract and the transfer of deed.[71] If accommodations are destroyed or damaged, however, sellers may elect to repair them in lieu of cancellation.[72] To protect the consumer's right to cancel, the statute prohibits the seller from including waiver provisions

66. S.C. CODE ANN. § 27-32-190(A)(1)-(2) (Supp. 1985).

67. The disclosures required in the contract are set out *supra* notes 40-41 and accompanying text.

68. FLA. STAT. ANN. § 721.07 (Harrison Supp. 1984).

69. S.C. CODE ANN. § 27-32-40(3) (Supp. 1985). *Cf.* FLA. STAT. ANN. § 721.10 (Harrison Supp. 1984)(providing a 10-day cancellation period); CONN. GEN. STAT. ANN. § 42-103y(a) (Supp. 1985)(15-day recission period). Most states that regulate time sharing provide for similar cancellation periods, ranging from 4 to 15 days.

70. S.C. CODE ANN. § 27-32-10 (Supp. 1985).

71. *Id.* § 27-32-40.

72. *Id.* § 27-32-50.

in the contracts or soliciting waivers from purchasers[73] and permits the Commission to impose a fine or require other "remedial steps" if a seller refuses to honor the right to cancellation[74] or in any way misrepresents the buyer's right to cancel.[75]

In order to ensure that purchasers who cancel receive a refund, sellers are required to place all funds received from a purchaser into a real estate broker's trust account, and these funds may not be withdrawn until the expiration of the four-day cancellation period.[76] Although this approach is not foolproof—an unscrupulous seller can always simply misappropriate the money—it should protect purchasers in most cases.

The majority of complaints received by the Real Estate Commission fall into one of two categories: either the consumer did not receive the promised gift[77] or the initial payment was not returned after cancellation of the contract.[78] Because of the implicit threat of losing their time-share sales licenses, developers are generally cooperative, and the Commissioner can usually resolve these disputes amicably. Thus, the Commissioner need not resort to the Act's remedial provisions, and the consumer is saved the trouble and expense of litigation.

Prior to passage of the Act, disgruntled purchasers would have found themselves in the same situation as the plaintiffs in *Agrawal v. Rault Club Ten, Inc.*[79] In that case the aggrieved purchasers were forced to litigate because of a fairly typical scenario that, under the South Carolina Act, could probably be handled administratively by a simple phone call. The plaintiffs, after listening to a two-hour sales pitch, signed a time-share agreement without reading it. Although they believed they were signing a contract of sale, in fact, they signed a lease agreement. When they notified the developer of their desire to cancel the contract, he refused. They then filed suit.[80] The court invalidated the time-share agreement and returned the downpayment, but was compelled to base its decision on an obscure Louisiana

73. *Id.* § 27-32-110(10).
74. *Id.* §§ 27-32-50, -120. *See infra* notes 93-95 and accompanying text.
75. *Id.* §§ 27-32-70, -120.
76. *Id.* § 27-32-60(3)(a)-(b).
77. *See infra* notes 98-102 and accompanying text.
78. Hagreen Interview, *supra* note 8.
79. 464 So. 2d 951 (La. Ct. App. 1985).
80. *Id.* at 952.

civil doctrine of "error as to motive."[81] Although the purchasers could have cancelled their contract easily under Louisiana's recently enacted time-sharing act,[82] the agreement was signed prior to the act's enactment date, and the court refused to give it retroactive effect.

The *Agrawal* case illustrates how effectively a cancellation provision can resolve minor disputes and protect consumers who have fallen prey to a sales pitch. Although the purchaser's downpayment was only 1,040 dollars,[83] they were forced to undertake expensive litigation, including an appeal. If this case had occurred in South Carolina, the developer probably would not have refused Agrawal's request for a refund because the loss from possible license forfeiture would have outweighed any gain from a single sale. Even if the developer had refused to cancel the contract and return the money, the purchasers could still have avoided litigation because of the Real Estate Commissioner's remedial powers under South Carolina's statute.[84]

E. Escrow Requirement

Another consumer protection provision in the South Carolina Act is the requirement that fifty percent of all cash received from purchasers of vacation time-sharing lease plans be placed in escrow to satisfy the underlying mortgage, liens, and encumbrances.[85] In practice, however, the Real Estate Commission requires the developer to place one hundred percent of the cash into escrow, even though this requirement appears to contravene the statute. Cash flow analyses have shown that, because of the large outlays of developers, including costly marketing expenditures, fifty percent is simply not adequate to cover the underlying mortgages. The one hundred percent escrow account is still no guarantee that the underlying mortgage will be covered, but can provide much more assurance to consumers. Because of the high amount at risk, developers are less likely to mismanage the

81. *Id.* at 953.

82. LA. REV. STAT. ANN. 9:1131.13 (1986) provides for a right to cancel. The statute was approved by the legislature on July 14, 1983, four months after the time-share agreement was signed on March 12, 1983. 464 So. 2d at 953.

83. 464 So. 2d at 952.

84. *See infra* notes 103-16 and accompanying text.

85. S.C. CODE ANN. § 27-32-90 (Supp. 1985).

purchaser's money. The Commission spot audits these escrow accounts, and the discovery of any misappropriation could result in revocation of the time-share or broker license and a possible prison sentence for the developer.[86]

F. Licensing Requirement

In an attempt to rehabilitate the time-share industry's reputation, the Act includes extensive seller licensing provisions.[87] A time-share seller must have a good reputation for honesty and truthfulness and a good credit history, must be employed by a licensed real estate broker, and must consent, irrevocably, to the jurisdiction of the South Carolina courts. In addition, applicants must pass an examination on the time-share statute and related topics.[88]

South Carolina's licensing requirements, however, may be overinclusive. They apply to "[a]nyone desiring to act as a seller of vacation time sharing plans,"[89] including time-share licenses. Arguably, a time-share license is not an interest in land, but a contractual interest. In practical terms, however, the time-share license is the same as a lease, which is an interest in real estate. Furthermore, the Act's definition of "seller" is so broad that an employee who merely makes promotional telephone solicitations for time-share licenses apparently must be licensed.[90] In *Boise Cascade Home and Land Corp. v. Division of New Jersey Real Estate Commission*,[91] a New Jersey court ruled that a developer's telephone solicitors were required to be licensed.

Although it may appear overly burdensome to require all of

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86. *Id.* §§ 27-32-90, -120.
87. *Id.* § 27-32-180.
88. *Id.* § 27-32-180(A)-(B).
89. *Id.* § 27-32-180(A).
90. The Act defines a "seller" as
> any business entity, including but not limited to agents, dealers, distributors, franchisors, subsidiaries, assignees, resellers, brokers or any other representatives thereof who, for a fee, commission or other valuable consideration, negotiates or attempts to negotiate the listing, sale, auction, purchase, exchange or lease of any real estate or the improvements thereon or collects rents or attempts to collect rent, or who advertises or holds himself out as engaged in any of the foregoing activities . . . .

Id. § 27-32-10(7).
91. 121 N.J. Super 228, 296 A.2d 545 (Ch. Div. 1972).

a developer's employees to obtain a time-share license, this provision was included in South Carolina's statute for several good reasons. First, it assures consumers that all personnel involved in a project are knowledgeable about the Act and the time-sharing concept. Second, as the court noted in *Boise Cascade*, licensing laws protect consumers from "fraud, incompetence, misinterpretation and sharp or unconscionable practice."[92] Most importantly, the rigid prerequisites of the licensing requirement should ferret out unscrupulous sellers and provide an incentive to other sellers to avoid deceptive practices. Applicants who do not have a reputation for honesty will not even qualify to take the license exam. Once they have licenses, developers will be reluctant to engage in unethical practices and risk revocation.

G. Continuing Management of Developments

The Vacation Time Sharing Plans Act contains several provisions intended to ensure ongoing management of time-share developments. First, the seller is required, at his or her own expense, to provide liability and casualty insurance for the accommodations and facilities in an amount equal to their replacement cost. Second, the seller must deposit in an escrow account sufficient funds to pay all taxes and assessments levied against the project. The seller may, however, provide that the escrow account be handled by an association or duly appointed agent representing the owners to pay the costs for maintenance, repairs, management fees, taxes, and assessments.[93] Thus, the Act requires proper handling of a maintenance fee account as well as the establishment of reserves for repair and replacement.

Although the Act provides that time-share projects be properly maintained and managed, it never expressly requires the creation of an owners' association or other form of management entity. As a result, the seller could manage the project with little or no attention to the owners' desires. The drafters probably thought that the disclosure and the specific management requirements would provide management with adequate incentive to represent the interests of consumers.

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92. *Id.* at 240, 296 A.2d at 551.
93. S.C. CODE ANN. § 27-32-90(3) (Supp. 1985).

H. Remedies for Consumer Complaints

The Vacation Time Sharing Plans Act provides efficient and inexpensive remedies for purchasers who have been subjected to unethical practices or other violations of the Act. Inevitably, disputes will arise that will require litigation, but the majority of complaints can be easily resolved through the channels provided by the Act.

1. Typical Complaints

The South Carolina Real Estate Commission receives a few hundred consumer complaints each year.[94] The most common ones fall within three categories: sales tactics and techniques, premiums or gifts, and cancellation problems.

In the sales tactics category, complaints include high pressure sales techniques, misleading representations regarding resale potential, rent, or amenities, and nondisclosure or other misrepresentations.[95] The practice of paying marketing employees on a commission basis increases the incentive to make false or misleading promises in order to close a deal. In addition, undercapitalized developers may purposely hire high pressure sales people to increase sales. One recurring problem is statements by some sellers about the ease in swapping time shares to spend a week at a different resort.[96] Although such swapping is an added feature of many time shares, it is frequently difficult for a time-share owner to trade weeks because exchange networks usually require that the week and resort the time-share owner trades be as desirable as the ones received in exchange. When purchasers are induced to buy a time share through such misleading sales pitches, it is inevitable that many will be dissatisfied after the sale. Unfortunately, exchange networks are not adequately covered under the South Carolina statute. The purchaser has a statutory remedy only if the seller misrepresented "the conditions under which a customer may exchange his rights to an accommodation in one location for rights to an accommodation in an-

94. Hagreen Interview, *supra* note 8.
95. *Id.*
96. *Id.*

other location."[97]

Another common source of complaints is the practice of offering gifts to potential buyers. Consumers often complain that the premiums or gift awards offered are overvalued or that the purchaser was informed that either the item was out of stock or the purchaser was not qualified to receive it.[98] Although the Act does not explicitly address promises for unavailable gifts, a serious complaint about this promotional device could come under the catch-all provision, which makes it a violation of the Act to "[d]o any other act which constitutes fraud, misrepresentation or failure to make a disclosure of a material fact."[99]

The Act does expressly prohibit two common practices employed in connection with premiums or gift awards. First, it is a violation to use a promotional device without fully disclosing that it is being used to solicit the sale of time shares.[100] Second, it is a violation to use devices to obtain the names of prospective purchasers without disclosing that the names will be used to solicit sales.[101]

The following excerpt is taken from an actual mail solicitation for the sale of a time share in Garden City, South Carolina:

> If married, both you and your spouse must take an informative inspection tour of the _____ Beach Club. . . . Upon completion of your inspection tour, . . . you will then receive your awards. . . . All awards in this program are guaranteed to be awarded . . . . This is promotional material being used for the purpose of soliciting the sale of interval ownership periods.

This advertisement poses two problems. First, it is a potential source for consumer complaints because of the statement that the gifts are "guaranteed." Inevitably, someone will not receive the promised award. Either an individual will be judged ineligible—perhaps because not credit worthy—or the seller will run out of gifts. A second, and more serious defect is the reference to "interval ownership periods." The statute refers, consistently, to "vacation time sharing plans," not to "interval ownership peri-

97. S.C. CODE ANN. § 27-32-110(a) (Supp. 1985) provides that such a misrepresentation is a violation of the Act.

98. Hagreen Interview, *supra* note 8.

99. S.C. CODE ANN. § 27-32-110(11) (Supp. 1985).

100. *Id.* § 27-32-110(1).

101. *Id.* § 27-32-110(2).

ods." In addition, there is only one reference to interval ownership in the Real Estate Commission regulations.[102] Most importantly, the ordinary consumer probably does not even know what interval ownership is. Most complaints about gift offers arise because unsuspecting consumers go on a tour to receive a free gift and are badgered into buying a time share.

2. *Power of the Commission to Investigate and Fine Developers*

Fortunately for consumers, the statute provides for a relatively easy resolution of their problems. The process starts when the consumer complains to the South Carolina Real Estate Commission. The Commission then sends the complaint to the developer. Next, the Commission conducts an investigation to determine whether a violation occurred and how serious it was. At this point, the Commissioner may dismiss the complaint or may determine that the violation was only minor and assess a monetary fine.[103] The Commissioner also has discretion to require "other remedial steps." If the person does not pay the fine or reach some "other remedial agreement" within ten days, the Commissioner can request that the Attorney General prosecute.[104] This section of the statute grants the Commissioner enormous power over time-share developers: he can levy a fine or threaten prosecution simply on the basis of an investigation. The mere threat of using this section's powers has been instrumental in curbing abusive practices in the industry. If any violation is found to involve bad faith or dishonesty, then the Commissioner can send notice of an administrative hearing before the Commissioner and assess all costs of investigation and prosecution.[105]

3. *Recovery Fund*

Any dissatisfied customer who wishes to cancel a contract can avoid the necessity of formal proceedings by requesting the

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102. S.C. Real Estate Comm'n R., S.C. CODE ANN. (R. & REG.) 105-40(B) (1976).
103. S.C. CODE ANN. § 27-32-120 (Supp. 1985).
104. *Id.*
105. *Id.* § 27-32-150(D).

Commission to apply pressure to the seller. Under the Act, the purchaser has the option to cancel the contract and obtain a full refund whenever a time share has been sold in violation of the Act's provisions.[106] If the purchaser can show actual damages, yet another remedy is available: the purchaser can seek compensation from the "South Carolina Vacation Time Sharing Recovery Fund." This fund, mandated by the statute, is made up of annual fees paid by all licensees.[107] So far, there has been no need to use the fund, primarily because developers have been willing to settle purchasers' grievances rather than risk losing their licenses.

The procedure for recovery from the fund is different from the cancellation procedure. The consumer must make a demand to the seller for damages based on a specific violation of the Act, and the seller must refuse the demand. Further, the Act imposes a one-year statute of limitations and provides that the applicant cannot be contributorily responsible.[108] After the seller's refusal, the consumer must file an application for recovery with the Commission, which then forwards the complaint to the developer. If the developer and consumer cannot settle the dispute, an administrative hearing date is arranged.[109] The dispute is heard before an arbitration panel consisting of one member selected by the consumer, one by the developer, and one by the Commission. The decision of the Board of Arbitrators is final and binding.[110]

4. Other Available Remedies

When an immediate remedy is needed, the Commission can apply immediate pressure through fines. In addition, the Commission, through the South Carolina Attorney General, may bring an action in the circuit court for an injunction or a temporary restraining order.[111] The Commission also has the power to issue cease and desist orders and to take any other affirmative action the Commissioner deems necessary to carry out the pur-

106. *Id.* § 27-32-120.
107. *Id.* § 27-32-200.
108. *Id.* § 27-32-210(A).
109. *Id.* § 27-32-210(C).
110. *Id.* § 27-32-230(A).
111. *Id.* § 27-32-190(B)(3).

pose of the statute if a seller is found to have done any of the following: (1) violated any provision of the statute or any Commission rule or order; (2) engaged in any deceptive promotions or sales methods; or (3) substantially altered its development or sales plan after registration without prior written approval from the Commission.[112] For example, in response to charges of misappropriations of money, the Commission brought a criminal action against three Horry County Developers.[113] The Commission has also fined developers up to 15,000 dollars for blatant violations.[114] Developers readily pay the fines in order to protect their licenses from revocation, even though the statute provides that a wilful violation is a misdemeanor.[115]

Although the Commission is responsible for enforcing the statute, the purchasers are not foreclosed from bringing private actions.[116] If all else fails, the consumer is always free to litigate. The obvious legislative intent, however, was to save the consumer from needless litigation. The extensive remedial provisions of the Act not only discourage abusive practices, but also encourage efficient dispute resolution. At this time, there is no record of any actions having been brought under the Act in the South Carolina courts.

V. DEVELOPER INSOLVENCY

Although the Vacation Time Sharing Plans Act is an important piece of legislation that has saved an innovative concept from unethical exploitation, some problems still remain. Of major concern to time-share purchasers is the possibility of developer insolvency and its effect on their interests.

A. The Special Problems of Right-to-Use Time Shares

The seriousness of the insolvency problem was underscored by a disturbing decision in *In re Sombrero Reef Club, Inc. v. Allman*.[117] In that case, Sombrero Reef, the debtor, had sold

112. *Id.* § 27-32-190(D)(1).
113. Hagreen Interview, *supra* note 8.
114. *Id.*
115. S.C. CODE ANN. § 27-32-120 (Supp. 1985).
116. *Id.* § 27-32-130.
117. 18 Bankr. 612 (S.D. Fla. 1982).

about 200 time share purchase agreements in a resort marina complex in the Florida Keys before filing for bankruptcy under Chapter 11.[118] All the purchasers had signed right-to-use time contracts, which the court classified as executory.[119] Under section 365 of the Bankruptcy Code,[120] the bankruptcy trustee was not obligated to honor the executory contracts, but could sell the units to third parties free of the purchasers' interests. As a result, the purchasers were relegated to the status of unsecured creditors.

An executory contract has been defined as one "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach."[121] Although some of the purchasers in *Sombrero Reef* had paid the purchase price in full, the court determined that these contracts were executory because the purchaser still had to pay annual dues[122] and the debtor had an obligation to maintain the property and provide services.[123]

Under section 365 of the Bankruptcy Code, unexpired leases and contracts for the sale of real property are given special protection. Subsections (h) and (i) provide that if the trustee rejects contracts for the sale of real property[124] or unexpired leases of real property,[125] the purchasers or lessors may elect either to treat the agreements as terminated or to remain in possession.[126] The court in *Sombrero Reef* found that the right-to-use contracts were neither unexpired leases nor contracts for the sale of real property. No delivery of title was contemplated, and the contracts specifically stated that purchasers had no interest in the property other than the right to reserve and occupy accommodations. As additional support, the court looked at the language of section 365, which refers to the sale of *real property*

118. *Id.* at 614-15.
119. *Id.* at 617.
120. 11 U.S.C. § 365 (West Supp. 1985).
121. Countryman, *Executory Contracts in Bankruptcy* (pt. 1), 57 MINN. L. REV. 439, 460 (1973).
122. The purchase price varied from $1,000 to $3,000; the annual dues ranged from $42 to $84, with an inflationary adjustment.
123. 18 Bankr. at 614, 616.
124. *Id.* at 617 (citing 11 U.S.C. § 365(h)(1) (1976)).
125. *Id.* (citing 11 U.S.C. 365(i)(1) (1976)).
126. 18 Bankr. at 617.

and not merely of *an interest or estate in property*. Although the lease exception posed a closer question, the court determined that purchasers received a right to obtain accommodations rather than a right to occupy certain real estate. Since purchasers would have little use for the rooms without the accompanying services, the right to use was a small part of the bargain and the agreement was, therefore, not a lease.[127]

The unfair result reached in *Sombrero Reef* appeared to be the death knell for right-to-use time sharing since right-to-use purchasers would rarely be able to recover their purchase price in bankruptcy proceedings. Just six and a half months after *Sombrero Reef*, however, the Senate intiated action to resolve the bankruptcy dilemma,[128] and Congress eventually enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984.[129] This act amended section 365 to specifically include time-share interests.[130] Under new section 365(h)(1), the right-to-use purchaser may treat the contract as terminated or remain in possession for the balance of the term. A purchaser who remains in possession may offset against the rent the damages occurring after rejection of the contract.[131]

Despite the amendments to section 365, the right-to-use purchaser still faces one potential problem, which was suggested in the *Sombrero Reef* opinion:

> Section 365(h) does not make a distinction between leases where the lessee is in possession and where he is not, but implies the necessity of possession by referring to a lessee *remaining* in possession. Possession is not defined. If these time share contracts were leases, it might be that they would be denied protection under subsection (h) because the defendants were not "in possession." However, given the concept of constructive possession and possession by agents which might be encompassed in §365(h), the court does not vote on that basis.[132]

New section 365(h), which now specifically includes right-to-use

127. *Id.* at 617-19.
128. *See* Comment, *supra* note 7, at 609-11.
129. Pub. L. No. 98-353, 84 Stat. 333 (1984).
130. *See* M. HENZE, *supra* note 15, § 5A.02[2].
131. 11 U.S.C. § 365(h)(2) (West Supp. 1985).
132. 18 Bankr. at 618-19 (emphasis in original).

purchasers, also refers to the lessee remaining in possession. As the court pointed out, the constructive possession or possession by agents concepts may suffice to bring right-to-use purchasers within the statute.[133]

Prior to the amendments to section 365, many states attempted to circumvent the bankruptcy problem by requiring nondisturbance clauses in time-share leases.[134] According to one authority,

> A nondisturbance clause is an agreement by the lender or lien holders to release the purchaser from any obligation for remaining liens or mortgages against the property of the developer. The developer will not be allowed to sell or further mortgage the property unless the new purchaser, lender or lien holder agrees to accept the property as it currently exists. (i.e. subject to the present right-to-use interests). The lender or purchaser must also agree not to disturb the time-share purchaser in his quiet possession and enjoyment of the property.[135]

The court in *Sombrero Reef*, however, held that "the non-disturbance agreements and provisions do not create a protectible interest under § 365(h) or (i) where one does not exist otherwise."[136] Now that section 365(h) explicitly creates protectible interests in time shares, the nondisturbance clauses would, presumably, be effective, but superfluous. The point, however, is that many right-to-use purchasers at Sombrero Reef probably relied on the nondisturbance clauses to protect their interest in the event of financial troubles.[137] Thus, even conscientious purchasers who read their agreements could be buying worthless contracts. The insolvency problem will not be limited to those states that do not adequately provide for the financial stability of developers. Even if a state attempts to ensure financial stability, the result may be a mere chimera of protection, as was the case with Florida's mandatory nondisturbance clause requirement.

The South Carolina Vacation Time Sharing Plans Act does not provide for nondisturbance clauses. Instead, the statute at-

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133. *Id.* at 618-19.
134. *See, e.g.*, FLA. STAT. ANN. § 721.08(e) (Harrison 1983).
135. M. HENZE, *supra* note 15, § 5A.01[1].
136. 18 Bankr. at 619.
137. Rock, *supra* note 4, at 126.

tempts to prevent financial problems by requiring escrow accounts to provide funds for outstanding indebtedness.[138] In 1982, however, when the Governor's Club Resort in Myrtle Beach filed for bankruptcy under Chapter 11,[139] the right-to-use owners entered an agreement under which they gave up their interest for one year in return for the grant of a leasehold interest. Although the time-share owners did not suffer a total loss, as in *Sombrero Reef*, they did sustain significant impairment of their interests, despite legislation addressing the problem.

B. The General Problems for All Time-Share Owners

Fee time-share interests have always been protected in bankruptcy proceedings because the purchasers actually receive title to the property. Transfer of title constitutes a sale of real property protected even under the old section 365(i). The section was amended, however, to specifically include "the sale of a timeshare interest under a timeshare plan."[140]

Fee time shares are not immune, however, from other problems arising from the financial instability of developers. If a project bankrupts and the time-share owner elects to retain possession under section 365(i), the question remains of who is going to provide and pay for accompanying services such as maintenance and management. It is certainly unlikely that the bankrupt resort will be able to continue furnishing such services. Although section 365(i) permits the owners to offset any damages against payments under the contract, the owners still must organize in order to provide maintenance, mail delivery, utilities, and other services that the developer would be responsible for under the contract. Even if the owners are capable of organizing themselves, some will no doubt elect to terminate their contracts, leaving higher costs for a smaller group to pay.[141]

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138. S.C. CODE ANN. § 27-32-95 (Supp. 1985).

139. *See* M. HENZE, *supra* note 15, § 5A.05.

140. Pub. L. No. 98-353, 84 Stat. 333 (1984).

141. If, for example, half the owners at the Governor's Club Resort elected to terminate the average maintenance fee of $200 per owner, it would have left an additional $80,000 for the remaining 400 owners to absorb. In fact, one owners' association felt the maintenance fees on just 25 units were enough to justify a lawsuit. In Colony Council Bd. of Directors v. Hightower Enters., 228 Va. 197, 319 S.E.2d 772 (1984), the developer reacquired 25 units after purchasers defaulted, then refused to pay the assessments and maintenance fees on those units. Although the case never specified the amount of the

A similar problem may occur if a financially insecure developer, in an effort to boost sales, sets maintenance fees at levels insufficient to cover operating costs. When the project is turned over to the owners' association, either because all the units have been sold or because the developer has filed for bankruptcy, the owners inherit a deficit and insufficient reserves. This was probably the case in *Sombrero Reef*, where maintenance fees ranged from forty-two to eighty-four dollars.[142] In *Sombrero Reef*, however, the resort was never turned over to the owners so they did not have to deal with the problem of an operating deficit.

VI. THE FUTURE OF TIME SHARING

A. *Passage of Management to the Owners' Association*

Probably the largest question facing the time-share industry in the future is what will happen when ownership passes from the developer to the owners' association.[143] According to Tom Bell, staff attorney for the Florida Department of Business Regulation, "By and large, state statutes don't adequately address the financial stability of the developer or how long term management will be handled, and that's the wave of problems in the future."[144] Once ownership passes to the owners' association, the developer may be relieved of all legal liability. Even if an escrow account has been properly maintained, the developer may have been assessing unrealistically low maintenance fees that did not cover actual operating costs. Some time-share agreements protect the purchasers by requiring the developer to make up the deficit between the sums paid by other owners and the actual costs of operation and maintenance.[145] If, however, the agreements contain no such requirement, the purchasers and the

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fees, the owners' association felt that their increased financial burden was sufficient to bring a declaratory judgment proceeding and to appeal the decision to the Virginia Supreme Court.

142. 18 Bankr. at 614.

143. Of course, the owners' association members may decide to retain the developer as manager after they have assumed control. If not, the association may choose an independent management firm. In either situation, there is a real need for professional management to insure that the money is collected and properly spent.

144. *See* Rock, *supra* note 4, at 125.

145. Colony Council Bd. of Directors v. Hightower Enters., 228 Va. 197, 198, 319 S.E.2d at 772, 773.

owners' association may be without any recourse against the developer once all the units have been sold.

One possible solution would be a provision similar to the one in Florida's Real Estate Time Sharing Act, which imposes on the developer a statutory duty to "supervise, manage and control all aspects of a time-share plan."[146] If the developer has been intentionally assessing inadequate fees, without making up the difference, the owners might be able to bring an action for breach of the statutory duty to manage the time-share plan. For example, if the developer had not gone into bankruptcy in *Sombrero Reef*, he probably could have been held in violation of his duty to manage for failure to assess adequate fees to maintain and operate the facility.[147] In practice, however, the owners may not discover the insufficient reserves until it is too late. Once control has passed to the owners' association, it is questionable whether the developer can still be held accountable.

The problem is heightened in South Carolina where there is no statutory requirement that the developer organize an owners' association. Although it is in the developer's best interest to establish an association, inevitably many will not do so. Most time-share owners automatically form an owners' association that, presumably, will assume control when all the units have been sold. Once the owners' association begins managing the time-share plan, the developer has no further responsibility under the South Carolina statute, provided the escrow account has been properly maintained and the other statutory requirements have been met. Because the South Carolina statute does not contemplate long term management problems, all of the problems that initially gave time sharing a bad name would again be unregulated.

Another solution might be to impose on the developer a statutory fiduciary duty to manage and control the project, which would be analogous to the fiduciary duty of the escrow agent to the purchasers under Florida's Time Share Act.[148] When all the units are sold, that duty would be assumed by the entity replacing the developer. Whatever solution is selected, the problem must be addressed within the next few years, when

146. FLA. STAT. ANN. § 721.08 (Harrison Supp. 1984).
147. 18 Bankr. at 614.
148. FLA. STAT. ANN. § 721.08 (Harrison Supp. 1984).

time-share owners' associations begin to assume management of the developments. So far, only a few projects in South Carolina have passed into the hands of owners' assocations.[149]

B. *Redefining Time Sharing*

The definition of time sharing needs reconsideration. Time sharing is a relatively new concept and has no time-worn principles on which parties can rely. Because of increased regulation, the industry is now seeking new forms of transferring interests that will not be classified as time sharing under existing regulatory statutes. Currently, there is considerable debate over how to distinguish between time sharing and "multiple ownership." For example, if seven people get together and buy a 770,000-dollar vacation home at Lake Tahoe and each pays 110 dollars for seven weeks a year, is this arrangement time sharing or is it multiple ownership? What if some of the owners decide to rent out a few of their weeks each year? Are they time sharing? These are just a few of the questions that need to be addressed as time sharing is given a more precise definition.

VII. CONCLUSION

Time sharing is a relatively new concept that has overcome many barriers to gain approval. Initially, the time-sharing industry was troubled by fraud and racketeering, later by bankruptcies and time shares with no resale market, and now by the uncertainties of long term management and the need for redefinition. Yet the public is becoming more educated and is beginning to realize that honest time-share developers do exist. Time sharing is a boon for middle class families that like to vacation one week every year, but cannot afford to buy their own vacation home or pay the rising costs of hotel accommodations. Because it is a coastal state, South Carolina recognized and addressed the problems at an early stage, in time to save a worthwhile concept from its tainted image.[150] Although time sharing's

149. Hagreen Interview, *supra* note 8.

150. As one commentator described this image: "To Gardner [Presiding Justice on the California Appellate Court] property owned by time-sharing is tantamount to being a nuisance per se that should be driven, together with liquor stores, massage parlors, and mobile homes, beyond the limits of respectability." August, *supra* note 2, at 213.

reputation is not yet totally rehabilitated, comprehensive legislation such as South Carolina's Vacation Time Sharing Plans Act has done much to raise the public's perception of the time-share industry. Of course, unsolved problems and unanswered questions remain, but time sharing will continue to grow, and South Carolina, like all states, must move quickly to keep pace.

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